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IN THE

Supreme Court of the United States

October Term, 1953

Docket No. [redacted]54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Michael J. Regan prays that a writ of certiorari issue to review the judgment of the Court of Appeals, State of New York, rendered and entered on March 12, 1954, denying a motion for reargument of an appeal to that Court and granting a motion to amend the remittitur in the above cause so as to indicate that a federal question was therein presented and passed upon. A judgment of the County Court, County of Kings, State of New York, rendered on April 9, 1953, convicted the petitioner of the crime of Criminal Contempt of Court (New York Judiciary Law, §750 subdiv. A, 5; New York Code of Criminal

Procedure §619; New York Penal Law §600, subdiv. 6), after a trial by Leibowitz, County Judge, and a special jury (R. 214, f. 640). Petitioner was sentenced to one year in the New York City Penitentiary (R. 219, f. 656). The Appellate Division of the Supreme Court of the State of New York affirmed the conviction without opinion (R. 230, ff. 688-90), but with a brief memorandum reported in 282 App. Div. 755. Leave to appeal and admission of petitioner to bail after he had served part of the sentence, was granted by Associate Judge Froessel of the Court of Appeals, State of New York (R. 277, ff. 679-81). After two months of deliberation, the judgment of the Appellate Division was affirmed without opinion by the Court of Appeals on January 22, 1954. Stay of execution pending determination of motions for reargument and for amendment of the remittitur of the Court of Appeals so as to indicate that a federal question was passed upon, and pending disposition of this petition for certiorari was granted by Associate Judge Fuld of the Court of Appeals.

Opinions Below

No opinions were rendered below in connection with this proceeding, either in the trial court, intermediate appellate court or in the highest court of the state. A memorandum in connection with the affirmance of the judgment of conviction by the Appellate Division as well as the statement by the Court of Appeals in granting the motion of petitioner to amend the remittitur so as to indicate that a federal question was passed upon by that Court, are both set forth in Appendix A, *post*, pp. i, ii.

Jurisdiction

The jurisdiction of this court in invoked under 28 U. S. C. §1257(3). See also Rules 12, 38, Revised Rules of the Supreme Court of the United States, adopted February 13, 1939, as amended. The judgment of the Court of Appeals, State of New York, was entered February 3, 1954. Motion for reargument was denied on March 12, 1954. Grounds for invokement of jurisdiction are that the questions presented by petitioner constitute grave ones of constitutional law involving the rights of petitioner under the due process and privileges and immunities clauses of the Fourteenth Amendment of the Constitution of the United States, insofar as such provisions guarantee in a state criminal proceeding petitioner's rights of privacy, freedom of expression and liberty of silence; his right to counsel; his privilege against self-incrimination; his rights against a mosaic of circumstances of abuse in a criminal proceeding at the hands of respondent; and his right against actual execution by respondent of its threat of a year's imprisonment unless petitioner confess to a series of felonies. Each point involves, in one or more of its aspects, a matter of first impression in this Court.

Questions Presented

The following questions under the Fourteenth Amendment of the Constitution of the United States, having been passed upon by the Court of Appeals of the State of New York adversely to petitioner, are presented:

1. Does the actual execution by a State of its threat of a year's imprisonment unless an involuntary "witness",

appearing only after arrest, against whom a grand jury investigation is in fact being directed, confesses to the commission of a series of felonies, violate the due process clause of the Fourteenth Amendment?

2. Does a signature obtained from such "witness" under numerous particular conditions of abuse at the hands of the State and the insistence by a single presiding and trial judge that such signature operates irrevocably and forever as an effective waiver of federal constitutional rights of privacy, liberty of silence and against actual execution of a threat of punishment for not making full confession of a series of felonies, violate the due process clause of the Fourteenth Amendment?

3. Does such signature thus obtained under circumstances where right to counsel has been denied operate irrevocably and forever as an effective waiver of such federal rights guaranteed by the due process clause of the Fourteenth Amendment?

4. Does the flat denial by a State of both immunity for incriminating answers and the right to refuse to answer incriminating questions, under the circumstances of this case, constitute a denial of due process of law or an abridgement of the privileges and immunities of citizens of the United States, under the Fourteenth Amendment?

5. Does actual punishment at the hands of a State for failure to confess to a series of felonies, constitute an invasion of privacy and denial of both liberty of silence and freedom of expression guaranteed by the due process clause of the Fourteenth Amendment?

Reasons Relied on for the Allowance of the Writ

A. Repeatedly this Court has considered use of threats and torture by a State to obtain a confession leading to conviction of a crime a denial of due process of law in a procedural sense. Certainly infliction of punishment in the name of the State for failure of an involuntary "witness" under arrest to make such confession can be no less a denial of due process under the Fourteenth Amendment.

B. It was error for the presiding and trial judge to hold as a matter of law that a signature obtained under conditions of abuse operated irrevocably and forever to waive rights guaranteed by the due process clause of the Fourteenth Amendment involving liberty of silence, privacy and the right not to be punished for refusing to confess to a series of felonies. The conditions of abuse at the hands of the State surrounding the obtaining of the signature include (1) Threat of instant dismissal from civil employment for failure to sign; (2) No explanation of consequences of signing or advice concerning rights not to sign; (3) Obtaining signatures *en masse* in a crowded room so hurried as to make intelligent comprehension of what was involved virtually impossible; and (4) Avowal by the highest court of the State one month and five days later that "doubt and uncertainty" existed even at *that* time concerning the operation of such signature as an effective waiver of immunity for so short a period as ten days *in futuro*, and that the unsettled nature of the law justified a witness' refusal to answer and entitled him to release after conviction of criminal contempt of court by writ of habeas corpus. *People ex rel. Hofsaes* v. *Warden of City Prison*, 302 N. Y. 403, 406. The holding as a matter

of law that such signature operates as an effective waiver for almost twenty-two months *in futuro* is also a denial of due process under the Fourteenth Amendment.

C. Total deprivation by a State of immunity under the circumstances of this case coupled with punishment at the hands of the State for refusal to answer incriminating questions, deprives an involuntary "witness" under arrest of a right "implicit in the concept of ordered liberty" in violation of the due process clause of the Fourteenth Amendment. A comparative test of contemporary constitutions and statutes of English-speaking peoples throughout the world (Appendix B, *post*, p. iii) is one indication of the minimum requirement of due process of law with respect to the right thus denied. Such right was a settled mode and usage of proceeding under the common and statute law of England before the Declaration of Independence which has been shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation. The deprivation of this right by a State under the circumstances of this case also contravenes the privileges and immunities of citizens of the United States in violation of the Fourteenth Amendment.

D. Compulsion to speak and confess at the hands of the State invades privacy and denies liberty of silence and freedom of expression in violation of due process in a substantive sense insofar as that clause in the Fourteenth Amendment has made applicable to the States the restrictions imposed on the federal government in the First Amendment.

Constitutional and Statutory Provisions Involved

Constitution of the United States of America Article XIV, §1:

> "* * *. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *".

Constitution of the State of New York, Article 1, §6:

> "* * * nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his office or the performance of his official duties, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years, and shall be removed from office by the appropriate authority or shall forfeit his office at the suit of the attorney-general."

Code of Criminal Procedure, §10:

> **"No person to be a witness against himself in a criminal action or to be unnecessarily restrained**
>
> "No person can be compelled in a criminal action to be a witness against himself, * * *."

Penal Law, §381:

> **"Offender a competent witness; witnesses' privileges**
>
> "A person who has violated any section of this chapter relating to bribery or any section of this

article or who has committed an attempt to violate any such section is a competent witness against another person so offending. No person shall be excused from attending and testifying, or producing any books, papers or other documents before any court, magistrate or referee, or before any joint legislative committee, upon any investigation, proceeding or trial, for or relating to or concerned with a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation, proceeding or trial."

[To the same effect, see also *Penal Law* §§584 (Conspiracy) and 996 (Gambling).]

Code of Criminal Procedure, §619:

"Disobedience to subpoena, or refusal to be sworn or to testify, how punished

"Disobedience to a subpoena, or a refusal to be sworn or to testify, may be punished by the court or magistrate, as for a criminal contempt in the manner provided in the judiciary law."

Judiciary Law, §750:

"Power of courts to punish for criminal contempts

"A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and not others: • • •

"5. Contumacious and unlawful refusal to be sworn as a witness; or after, being sworn, to answer any legal and proper interrogatory * * * ".

Judiciary Law, §751:

"Punishment for criminal contempts

"Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days, in the jail of the county where the court is sitting, or both, in the discretion of the court. * * * "

Penal Law, §600:

'Criminal contempt

"A person who commits a contempt of court, of any one of the following kinds, is guilty of a misdemeanor: * * *

"6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * *."

Statement of the Case

Petitioner served as a patrolman in the police department of the city of New York from August 7, 1942 until his resignation on March 27, 1951 (R. 77-79, ff. 225-30). On March 7, 1951, he was subpoenaed to testify before the grand jury of the county of Kings. Petitioner went to an anteroom, "10 x 10, or 12 x 12" in size (R. 157, f. 470), with a desk in the room of "about 60 x 2" (R. 157, f. 471), with a bench, with about 35 people present (R. 158, f. 474), to which group an assistant district attorney made a single speech (R. 160, f. 480) and from all of whom he obtained

en masse waivers of immunity within a space of twenty-five minutes (R. 165, f. 494).

The examination of petitioner was adjourned and he resigned from the police force to enter private business on March 27, 1951. On December 22, 1952, almost twenty-two months after the signing of the waiver of immunity, petitioner was arrested and made to re-appear as a witness before the grand jury. At that time, an assistant district attorney put these questions to petitioner:

> "Q. While you were a plainclothesman in the Police Department of the City of New York did you ever accept or receive any bribes from bookmakers or other gamblers?"
>
> "Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York did you receive any bribes from bookmakers?" (R. 9, ff. 26-7).

Petitioner, aware for the first time that he was under investigation by the grand jury, accordingly responded:

> "I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.
>
> "I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity. I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having

> served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such" (R. 122-23, ff. 366-68).

On January 5, 1953, County Judge Leibowitz directed petitioner to answer the questions under an "effective waiver of immunity" (R. 127, f. 381). Upon petitioner's reiteration of his constitutional privilege, an indictment was returned by the same grand jury, which indictment accused petitioner of "knowingly, wilfully and corruptly committing the crime of Criminal Contempt of Court against the form of the statute in such case made and provided" (R. 10, f. 30).

In summation, at trial of the petitioner, the assistant district attorney thus characterized petitioner's predicament before the grand jury:

> "This is the position this man was in: If he answered the truth, if it was the truth, 'Yes, I took bribes from a bookmaker,' having signed this waiver of immunity, he could be prosecuted for perjury—both bribery, accepting bribes from bookmakers, and perjury, which are very serious felonies. The crime for which he stands indicted here is a misdemeanor. *So he was confronted with this alternative*: **[1]** If he answers 'Yes, I took a bribe,' he is going to be prosecuted for bribery. **[2]** If he says, 'No,' and

> it is not the truth, he is going to be prosecuted for perjury. If he said, 'No,' and it was the truth, then it was the simplest thing for him to say, 'No, I never took a bribe.' So what could he do? **[3]** He could not answer that question * * *" (R. 178-79, ff. 534-37).

Throughout these proceedings the district attorney has maintained that petitioner was either compelled to incriminate himself or suffer a year's imprisonment for contempt. The trial judge stated:

> "I agree with Assistant District Attorney Koota. It is not only the law, but common sense" (R. 208, f. 623).

The same judge flatly refused upon request of counsel for petitioner, to leave any issue of contumacity to the jury:

> "As to what his reasons were or what his purpose was is not a defense" (R. 207, f. 621).

The federal questions sought to be reviewed were raised at the very outset of the proceedings by petitioner himself in his refusal to answer (R. 122-23, ff. 366-68), in a motion before trial to dismiss the indictment on March 4, 1953 (R. 57-58, ff. 171-72), in a motion at the close of the prosecution's case at trial (R. 147, f. 439), upon examination of witnesses by defendant at trial (R. 168, ff. 504-06), in exceptions to request to charge (R. 209, ff. 627-28), and in oral argument and brief on appeal to the Court of Appeals (Defendant-Appellant's Brief, Point III, p. 36-43; Respondent's Brief, p. 41). Upon motion by petitioner, the Court of Appeals amended its remittitur so as to indicate that these federal questions were raised and passed upon by that court [Appendix A, *post*, p. ii].

ARGUMENT

POINT I

Actual execution at the hands of the State of its threat of a year's imprisonment unless an involuntary "witness" under arrest confesses to a series of felonies violates the due process clause of the Fourteenth Amendment.

Concededly the questions put to petitioner, an involuntary "witness" under arrest, could be responsively answered only by a confession to a series of felonies:

> "Q. While **you** were a plainclothesman in the Police Department of the City of New York did **you** ever accept or receive any bribes from bookmakers or other gamblers?"
>
> "Q. I now ask **you**, Mr. Regan, while **you** were a plainclothesman in the Police Department of the City of New York did **you** receive any bribes from bookmakers?" (R. 9, ff. 26-7).

That this investigation of the grand jury was directed against the petitioner, was frankly admitted by the district attorney in the indictment.

> "That said Grand Jury was investigating whether the **defendant** had received and accepted bribes in the County of Kings from bookmakers and gamblers to permit said gamblers and bookmakers to continue their gambling activities without police interference and to afford said bookmakers and gamblers police protection; whether this **defendant** was in the possession of money, income or other assets which represented the proceeds of bribes given to **him** by

gamblers and bookmakers in the County of Kings" (R. 9-10, ff.27-8).

Repeatedly this Court has held that the due process clause of the Fourteenth Amendment is violated when a St. ' employs threats or punishment to obtain a confession of crime or otherwise. *Wieman* v. *Updegraff*, 344 U. S. 183; *Chambers* v. *Florida*, 309 U. S. 227; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401. There is indeed little qualitative difference between the actual execution by a State of its threat of a year's imprisonment unless the witness provides incriminating evidence against himself, on one hand, and threat of dismissal unless a test oath is taken (*Wieman*), or five days of questioning while incommunicado unless such incriminating evidence is provided (*Chambers*), or thirty-six hours of such interrogation (*Ashcraft*), or stripping the witness (*Malinski*), on the other hand, so far as the requirements of the Due Process Clause embrace "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski* v. *New York*, *supra*, 324 U. S. at page 416-17; *Rochin* v. *California*, *supra*, 342 U. S. at page 169.

POINT II

A mosaic of circumstances of abuse, including denial of the right of counsel, surrounding the State's obtaining of petitioner's signature, and the holding that such signature was effective as a waiver of immunity on the occasion of interrogation almost twenty-two months later, denied petitioner due process of law.

It was error for the presiding and trial judge to hold as a matter of law that a signature obtained under conditions of abuse operated irrevocably and forever to waive rights guaranteed by the due process clause of the Fourteenth Amendment involving liberty of silence, privacy and the right not to be punished for refusing to confess to a series of felonies. The conditions of abuse at the hands of the State surrounding the obtaining of the signature include (1) Threat of instant dismissal from civil employment for failure to sign; (2) No explanation of consequences of signing or advice concerning rights not to sign; (3) Obtaining signatures *en masse* in a crowded room so hurried as to make intelligent comprehension of what was involved virtually impossible; and (4) Avowal by the highest court of the State one month and five days later that "doubt and uncertainty" existed even at *that* time concerning the operation of such signature as an effective waiver of immunity for so short a period as ten days *in futuro*, and that the unsettled nature of the law justified a witness' refusal to answer and entitled him to release after conviction of criminal contempt of court by writ of habeas corpus. *People ex rel. Hotsay v. Warden of City Prison*, 302 N. Y. 403, 406. The holding as a matter

of law that such signature operates as an effective waiver for almost twenty-two months *in futuro* is also a denial of due process under the Fourteenth Amendment.

Clearly, in a State criminal proceeding, denial of the right to counsel infringes the due process clause of the Fourteenth Amendment in a procedural sense because the defendant has had no hearing in the sense of reasonable comprehension of what transpired. *Powell* v. *Alabama*, 287 U. S. 45. In a non-capital State case, the Supreme Court has said (*Uveges* v. *Pennsylvania*, 335 U. S. 437, 441) that only when there has been refusal of "counsel with an understanding of his rights can the court dispense with counsel". The petitioner in this case had no "understanding of his rights" at the time he signed the paper on March 7, 1951, in view of the numerous additional circumstances of abuse. When petitioner later retained counsel, attempts to withdraw the waiver were unavailing. The act of signing was forever irrevocable. Its effect was devastating, as the decision of this Court in the instant case makes clear. No later proceeding at which petitioner was represented by counsel could cure the denial on March 7, 1951, and in this respect this case is distinguishable from *Canizio* v. *New York*, 327 U. S. 82, and *Gayes* v. *New York*, 332 U. S. 145.

POINT III

The flat denial by a State of both immunity for incriminating answers and the right to refuse to answer incriminating questions, under the circumstances of this case, constitutes a denial of due process of law and an abridgement of the privileges and immunities of citizens of the United States under the Fourteenth Amendment.

Consider as the federal constitutional question in this case the provision of the Fourteenth Amendment, "Nor shall any State deprive any person of life, liberty, or property, without due process of law." Several tests of due process in State criminal proceedings have been enunciated by the Supreme Court of the United States. A familiar one, first voiced by Justice Cardozo (*Palko* v. *Connecticut*, 302 U. S. 319, 325), and reiterated by Justice Frankfurter in *Wolf* v. *Colorado*, 338 U. S. 25, at page 27, is that the due process clause "exacts from the States for the lowliest and the most outcast all that is 'implicit in the concept of ordered liberty'." Is the right against self-incrimination implicit in the concept of ordered liberty? In the same case, the Supreme Court held that the right against unreasonable search and seizure was thus implicit. Justice Frankfurter, writing the opinion, explicitly based the decision upon the intrusion of privacy (*Id.*, 338 U. S. at pages 27, 28, 29):

> "The security of one's **privacy** against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in the 'concept of ordered

> liberty' and as such enforceable against the States through the Due Process Clause. * * *
>
> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into **privacy** it would run counter to the guaranty of the Fourteenth Amendment. * * *
>
> "As a matter of inherent reason, one would suppose this to be an issue as to which men with complete devotion to the protection of the **right of privacy** might give different answers."

So far as the interest in privacy is to be weighed, intrusion by unreasonable search and seizure offers no greater violation than denial of the privilege against self-incrimination.

The so-called comparative test of what constitutes a fundamental right protected by the due process clause of the Fourteenth Amendment, *cf. Powell* v. *Alabama*, 287 U. S. 45, clearly indicates that the privilege against self-incrimination is of the very essence of liberty. Not only the Federal Constitution itself (Amend. V) but those of 46 out of 48 States, as well as statutes in those States and other English-speaking communities of the world [Appendix B, *post*, p. iii-v], guarantee such privilege. And the so-called historical test of what constitutes due process, would most certainly require guarantee of the privilege against self-incrimination from infringement by a State. It was a settled usage and mode of proceeding under the common and statute law of England before the Declaration of Independence which has been shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it

became a nation. *Cf. Lowe* v. *Kansas*, 163 U. S. 81, 85; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 276-277.

The circumstances of abuse in the instant case, the sharply contrasted facts under which the privilege was asserted, the recent decisions of this Court in *Wolf* v. *Colorado*, and *Rochin* v. *California*, *supra*, call for re-examination by the Court of its sharply divided opinions in *Adamson* v. *California*, 332 U. S. 46 and *Twining* v. *New Jersey*, 211 U. S. 78. Indeed since adoption of the Fourteenth Amendment, at least twenty-one justices of this Court have indicated their belief that the Fourteenth Amendment prohibits flat denial by a State of the privilege against self-incrimination. *Cf. Adamson* v. *California*, 332 U. S. at pages 68-123.

Accepting for the moment as the test of the federal question in this case, the restrictions imposed upon the States by the provision of the Fourteenth Amendment that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States", what are the privileges or immunities of citizens of the United States? Certainly these have been defined in the Bill of Rights contained in the first eight amendments to the Constitution and include the privilege against self-incrimination. Concurring in *Rochin* v. *California*, 342 U. S. 165, at pages 174-5, Justice Black repeated his

> "belief that state as well as federal courts and law enforcement officers must obey the Fifth Amendment's command that 'No person * * * shall be compelled in any criminal case to be a witness against himself.'"

And Justice Douglas said in concurrence, *Id.*, 342 U. S. at pages 178-9:

> "As an original matter it might be debatable whether the provision in the Fifth Amendment that no person 'shall be compelled in any criminal case to be a witness against himself' serves the ends of justice. Not all civilized legal procedures recognize it. But the choice was made by the Framers, a choice which sets a standard for legal trials in this country. The Framers made it a standard of due process for prosecutions by the Federal Government. If it is a requirement of due process for a trial in the federal courthouse, it is impossible for me to say it is not a requirement of due process for a trial in the state courthouse."

POINT IV

Compulsion to speak and confess at the hands of the State invades privacy and denies liberty of silence and freedom of expression in violation of due process in a substantive sense insofar as that clause in the Fourteenth Amendment has made applicable to the States the restrictions imposed on the federal government in the First Amendment.

The evolution of the doctrine that the due process clause of the Fourteenth Amendment of the Constitution of the United States protects the individual's "liberty of silence" and "right of privacy" against State interferences such as that in the instant case is hardly a generation old. As late as 1922, the Supreme Court said in *Prudential Insurance Co. v. Cheek*, 259 U. S. 530 at page 543:

> "(N)either the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech' or the 'liberty of silence'; nor, we may add, does it confer any right of privacy upon either persons or corporations."

It goes without saying that no statement has ever been more squarely repudiated by a court than this one in several score of cases before the Supreme Court in the past two decades, beginning with an assumption *arguendo* in *Gitlow* v. *New York*, 268 U. S. 652 in 1925, and with the first square holding that freedom of speech is protected by the Fourteenth Amendment in *Near* v. *Minnesota*, 283 U. S. 697 in 1931. It would be unnecessary and repetitious to review all of these cases to determine the scope of freedom of speech, liberty of silence and right of privacy which the Supreme Court has held within the ambit of the Fourteenth Amendment. From some of the most recent decisions, it is clear that the Fourteenth Amendment protects individual liberty of silence and right of privacy against State governmental invasion such as the misuse of grand jury subpoena in the instant case.

As indicated, the Fourteenth Amendment protects the individual against invasion of privacy at the hands of the State. *Wolf* v. *Colorado*, *supra*, 338 U. S. 25 at pages 27, 28, 29; *Rochin* v. *California*, *supra*, 342 U. S. 165 at page 172. Compulsion to speak in flat repudiation of a Constitutional right to remain silent can be no less an intrusion upon privacy, and clearly violates liberty of silence and freedom of expression.

CONCLUSION

Wherefore, it is respectfully submitted that this petition
r a writ of certiorari should be granted.

ELAINE F. FRIEDMAN,
Attorney for Petitioner.

APPENDIX A

OPINIONS BELOW

Memorandum of Appellate Division, Supreme Court of the State of New York, reported in 282 App. Div. 775.

> "People, &c., res. v. Regan, ap—Defendant appeals from a judgment of the County Court, Kings County, convicting him of criminal contempt of court, and from 'each and every intermediary order therein made.' It was defendants' contention upon the trial that a waiver of immunity executed by him, prior to his appearance before the grand jury, while he was a New York City police officer, was ineffective, as he had not understood the full nature and scope of his act and the district attorney had failed to advise him with respect to his rights. The question of whether defendant signed the waiver knowingly and fully aware of its import and consequences was submitted to the jury as a question of fact. Judgment unanimously affirmed. Assuming, without deciding, that the district attorney was under a duty to advise defendant of the nature and effect of the waiver of immunity and his rights with respect thereto, we are of the opinion that the proof established, beyond a reasonable doubt, that defendant had been so advised and had voluntarily and knowingly executed the waiver. Defendant's other contentions have been examined and are without merit. The minutes of the preliminary hearings, printed in the record, have not been considered in reaching this determination. No separate appeal lies from the intermediate orders, which have been reviewed on the appeal from the judgment of conviction (Code of Criminal Procedure, Sec. 517)."

Order of the Court of Appeals of the State of New York, March 12, 1954, granting petitioner's motion to amend the remittitur.

"FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of remittitur requested and, when returned, it will be amended to read as follows:

Judgment affirmed. Upon this appeal there was presented and passed upon the following question: whether defendant had been deprived of liberty without due process of law and whether there had been an abridgment of defendant's privileges and immunities as a citizen of the United States under the Fourteenth Amendment of the Constitution of the United States. This Court held that there was no denial of any constitutional right of the defendant.

AND the County Court, Kings County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

"A copy

[Sgd.] RAYMOND J. CANNON
[SEAL] Clerk"

APPENDIX B

PROTECTION AGAINST SELF-INCRIMINATION AS A FUNDAMENTAL RIGHT

1. American Constitutional Guarantees Against Self-Incrimination

Every American jurisdiction except two has a constitutional guarantee against self-incrimination. **U. S.**, Amend. V; **Ala.**, Art. I, §6; **Ariz.**, Art. II, §8; **Calif.**, Art. I, §13; **Col.**, Art II, §18; **Conn.**, Art. I, §9; **Del.**, Art I, §7; **Florida**, Decl. of R., §12; **Ga.**, Art. I, §1, par. 6; **Idaho**, Art. I, §13; **Ill.**, Art. II, §10; **Ind.**, Art. I, §14; **Kan.**, Bill of R. §7; **Ky.**, §11; **La.**, Art. I, §11: **Me.**, Art. I, §6; **Md.**, Decl. of Rights, Art. 22; **Mass.**, Decl. of R., Art. 12; **Mich.**, Art. II, §16; **Minn.**, Art. I, §7; **Miss.**, Art. III, §26; **Mo.**, Art. II, §23; **Mont.**, Art. III, §18; **Nebr.**, Art. I, §12; **Nev.**, Art. I, §8; **New Hampshire**, Part I, Art. 15; **New Mexico**, Art. II, §15; **N. Y.**, Art. I, §6; **N. C.**, Art. I, §11; **N. D.**, Art. I, §13; **Ohio**, Const. 1851, Art. I, §10, as amended 1912; **Okla.**, Art. II, §21; **Ore.**, Art. I, §12; **Pa.**, Art. I, §9; **R. I.**, Art. 1, §13; **S. C.**, Art. I, §17; **S. D.**, Art. VI, §9; **Tenn.**, Art. I, §9; **Tex.**, Art. I, §10; **Utah**, Art. I, §12; **Vt.**, Ch. 1, Art. 3; **Wash.**, Art. 1, §9; **W. Va.**, Art. III, §5; **Wis.**, Art. I, §8; **Wyo.**, Art. I, §11.

2. American Territorial and Other Statutory Provisions Guaranteeing the Privilege

In addition to statutes in the 46 states mentioned above, statutory provisions affirming the privilege against self-incrimination also exist in these American jurisdictions: **Federal**, St., 1950, May 5, 81st C., 2nd Sess., cp. 169, Uniform Code of Military Justice, Part VI, Art. 31 (a), (b); St. 1948, June 24, 2nd Sess., 80th C., c. 625, Tit. II, Selective

Service Act, §214, 1948, 28, U. S. C. §1785; 48 U. S. C., §737; 10 U. S. C. §1495; 28 U. S. C. §702; 34 U. S. C. §1200; St. 1909, Feb. 16, c. 131, §12, Art. of the Navy, 1942; **Alaska**, Comp. L. 1913, §1507. Comp. L. 1933, §4265; **Canal Zone**, Code 1934, §1, par. 8e; C. C. P. 1934, §2142; C. Cr. P. 1934, §10; §673; **Hawaii**, Rev. L. 1925, §2619, Rev. L. 1935, §3827; **Puerto Rico**, U. S. St. 1917, Mar. 2, Organic Act, §2, 39 Stats. 951, Code 1919, §4043; P. R. Rev. St. & C. 1911, §1532, C. C. P. 1933, §526, C. Cr. P. 1935, §7, 1902, Re Decker, 1 P. R. Fed. 381; **Virgin Islands**, Com. C. 1920, tit. V, c. 1, §7.

3. Statutory Guarantees Against Self-Incrimination in English Speaking Countries

Practically every English speaking country has one or more statutory guarantees of the privilege against self-incrimination. **England**, 1806, St. 46 Geo. III, c. 37; 1851, St. 14 & 15 Vict. c. 99, §3; St. 1869, 32 & 33 Vict. c. 68, §3; 1898, St. 61 & 62 Vict. c. 36, §1; St. 1904, 4 Edw. VII, c. 15, §12; St. 1947, 10 and 11 Geo. 6, c. 43, Local Government (Scotland) Act, Part XX, §355(4); St. 1947, 10 and 11 Geo. 6, c. 47, Companies Act, Part I, §42(4). **Ireland**, St. 1944, No. 10, Midwives Act, Part III, §27. St. 1944, No. 21, Transport Act, c. 6, §43. St. 1944, No. 21, Transport Act, c. 6, §43. **Northern Ireland**, St. 1923, c. 9, Criminal Evidence Act. §1; St. 1946, Aug. 29, 10 & 11 Geo. 6, c. 21, Part V, §60. **Alberta**, St. 1910, 2d sess., c. 3, Evidence Act, §8, Rev. St. 1922, c. 87, §8; St. 1945, c. 10, The Coroners Act §21(1); St. 1947, Mar. 31, c. 42, The Alberta Evidence Act, amend. §8. **British Columbia**, Rev. St. 1924, c. 70, §27, Rev. St. 1936, c. 76, §27. **New Brunswick**, Consol. St. 1903, c. 127, §9, Rev. St. 1927, c. 131, §9; C. S. 1903, c. 127, §10, R. S. 1927, c. 131, §10. **Newfoundland**, Consol. St. 1916, c. 91, §2;

St. 1943, No. 45, Rent Restrictions Act, §10; St. 1946, May 21, No. 16, National Convention Act, §96; St. 1951, June 22, No. 45, The Local Government (Elections) Act, 1951, §92(3). **Nova Scotia**, Rev. St. 1900, c. 163, §37, Rev. St. 1923, c. 225, §37; St. 1947, May 29, c. 8, The Nova Scotia Factories Act, §32. **Ontario**, Rev. St. 1927, c. 107, §6, Rev. St. 1937, c. 119, §6. St. 1951, Apr. 5, c. 21, The Election Act, 1951, §153. **Prince Edward's Island**, St. 1889 c. 9, §6. **Yukon**, Consold. Ord. 1914, c. 30, §37.